

Integrator Liability: Legal Tools to Hold the Biggest Chicken Companies Responsible for Waste

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Introduction

The chickens we buy at the grocery store are produced by the millions in industrial facilities concentrated in just a handful of states. The industrialization and consolidation of the poultry business have concentrated production in what is now known as the Broiler Belt. In this area, which extends from eastern Texas through the southeastern United States and north to Maryland and Delaware, chickens outnumber people by as much as 400 to 1.¹ Along the way, the farms, known as animal feeding operations (AFOs),ⁱ generate approximately 500 million tons of manure each year—three times the amount of waste the human population of the U.S. produces²—and much of this waste ends up polluting the nation’s waterways.

The manure and chicken litter³ produced at these farms is chock-full of phosphorus, an essential nutrient for healthy waterways—but only in the right quantities. Too much phosphorus and algae growth explodes, devouring oxygen in the water and leading to “dead zones” that cannot support aquatic life. Algae can also be toxic. Phosphorus fueled an outbreak of poisonous algae in Lake Erie just last year that forced half a million people in Toledo and the surrounding Ohio communities to temporarily shut off their tap water.⁴ The U.S. Environmental Protection Agency (EPA) has determined that nearly 560,000 miles of rivers and streams in the U.S. are impaired—that is, unsuitable for their designated use—and 131,500 miles of those polluted streams are impaired due to agriculture.⁵ In other words, of the nation’s impaired rivers and streams, agriculture is responsible for polluting nearly a quarter of them.

Most of the farmers that raise these chickens contract with much larger, name-brand chicken companies such as Perdue and Tyson. In the contracts that govern the chicken trade, the companies, known as integrators, own the chickens. They supply growers with chicks and feed, then return to claim the birds for slaughter. The only thing the growers own is the waste, and they are legally responsible when it is not handled properly. This astoundingly unfair arrangement, which allows the integrators to escape liability for all pollution, is the result of years of successful lobbying efforts by the nationally powerful and well-heeled farm lobby. The American Farm Bureau Federation and its allies focus their lobbying efforts on the core interests of multi-billion dollar corporations like Perdue and Tyson, not the smaller, family farms that often have no choice but to enter into these one-sided contracts.

This Issue Alert argues that the integrators should share liability under existing law with the growers for disposal of the millions of tons of chicken litter produced each year. The nation’s most polluted waters will remain so until the country gets serious about tackling pollution from AFOs. Taking the piecemeal approach of enforcing against individual farmers for violating environmental laws is politically difficult and incredibly time-consuming, not to mention unfair. When they control the operations of small growers to a significant degree, as most do, large chicken companies must share responsibility of disposing of the waste appropriately.

ⁱ A subset of AFOs, known as concentrated animal feeding operations (CAFOs), are generally the largest and most polluting type of AFO. This Issue Alert will discuss how to hold integrators liable for waste produced at AFOs (which include CAFOs) except when discussing the Clean Water Act, which only regulates CAFOs.

This Issue Alert looks at past attempts to hold integrators liable for pollution from AFOs. It is organized according to the different types of legal tools that one might use for establishing integrator liability and covers the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Emergency Planning and Right-to-Know Act (EPCRA).⁶ The Issue Alert also addresses efforts to use state common law and attempts at state legislation. The paper provides some background on each tool, explaining the structure of each law and how one might use it to establish integrator liability. In addition, the paper briefly reviews any disadvantages that might come with trying to use a given legal tool.

Federal Law

Clean Water Act

Background

Unlike most farms, certain AFOs—known as concentrated animal feeding operations (CAFOs)⁷—are considered point sources under the Clean Water Act (CWA).⁸ The Act requires point sources to obtain a National Pollutant Discharge Elimination System (NPDES) permit before they are allowed to discharge pollutants into water bodies. Fewer than half of CAFOs nationwide, however, are required to obtain NPDES permits.⁹

In many cases, CAFOs dispose of their wastes by spreading it on fields to fertilize crops. The CWA exempts from point-source status—and thus from regulation—normal runoff pollution from these fields, which it refers to as “agricultural stormwater.” Consequently, one threshold question that must be answered before considering whether integrators can be held liable under the CWA for land application of CAFO waste is whether the CWA exempts the CAFO’s land application as agricultural stormwater. The EPA has consistently restricted this exemption so that it does not include instances in which a CAFO overapplies waste—that is, when it uses land essentially as a dumping ground for manure or chicken litter. To receive the exemption, a CAFO must comply with site-specific nutrient management practices, which include protocols designed to ensure the appropriate agricultural utilization of the waste and conservation practices to reduce runoff.¹⁰

Chicken litter can end up fouling surface waters in ways other than by overapplication. The waste is often stored in uncovered piles, and rain may carry it into a stream; it might leak out of the animal confinement area; or it might seep out of the area used to dispose of dead birds. If it ends up polluting nearby waters, it is generally considered a violation of the CWA. One federal district court in West Virginia, however, found that pollutants from a CAFO that were blown by fans from a chicken house and then washed by rain into a stream were exempt from the CWA’s permitting requirements under the agricultural stormwater exemption.¹¹ This decision is only binding within the district court’s jurisdiction.

Federal Efforts to Use the CWA

On January 12, 2001, the EPA proposed new rules for the operation of CAFOs. The agency proposed requiring integrators that exercise sufficient control over an operation to obtain a permit—a practice known as “co-permitting.” The provision would have required:

Any person who is an “operator” of a CAFO on the basis that the person exercises substantial operational control of a CAFO . . . must apply for a permit. Such operators may apply for an NPDES permit either alone or together as co-permittees with other owners or operators of the CAFO.”¹²

The proposal went on to explain that the test for “substantial operational control” depends on the circumstances, but relevant factors include:

[W]hether the entity: (1) Directs the activity of persons working at the CAFO either through a contract or direct supervision of, or on-site participation in, activities at the facility; (2) owns the animals; or (3) specifies how the animals are grown, fed, or medicated.¹³

Significantly, the proposed regulations emphasized that the CWA authorized the EPA and the states to require co-permitting of integrators, citing several court cases to support this interpretation of the CWA.¹⁴

Ultimately, the EPA did not include co-permitting in its final CAFO rule, which was issued in 2003. Consequently, federal regulations do not require integrators to obtain permits for the activities of their contract growers, regardless of the level of the integrator’s control over those farms. Political pressures likely forced the EPA to step back from its initially strong position that the CWA authorizes the co-permitting of growers and integrators. In a recent Issue Alert, CPR President Rena Steinzor and three CPR policy analysts urged President Obama’s EPA to promulgate a new CAFO rule that requires co-permitting.¹⁵

State Agency Efforts to Use the CWA

Forty-six state environmental agencies, rather than the EPA, are primarily responsible for carrying out the CWA’s NPDES permitting program. No state environmental agency currently requires co-permitting as part of its implementation of the NPDES program, although several states have attempted to do so.

Maryland

In 2001, Maryland became one of the first states to try to hold large chicken companies liable for the poultry litter produced on the farms of their contract growers. Beginning in that year, the Maryland Department of the Environment (MDE) attached conditions to the discharge permits governing three of the largest chicken slaughterhouses in the state, making the slaughterhouse responsible for the practices of the farmers growing the chickens.¹⁶

By 2003, however, the initiative was abandoned. The poultry companies challenged MDE's decision to attach these conditions to the permits, and an Administrative Law Judge found that this permitting requirement was beyond MDE's jurisdiction.¹⁷

Kentucky

The Kentucky General Assembly considered legislation establishing a co-permitting requirement for its NPDES program in 2000. The legislature failed to pass the bill in the face of heavy opposition from the Kentucky Agriculture Department and the state Farm Bureau.

After the failure of the Kentucky law to require co-permitting, the Kentucky Environmental and Public Protection Cabinet issued emergency regulations requiring integrators to obtain NPDES permits. The effort came to naught, however, when a state Administrative Regulation Review Subcommittee rejected the regulations.¹⁸

Georgia

The Georgia Department of Natural Resources proposed rules for the chicken and cattle farming industries in 2000 that would have required NPDES co-permitting for both integrators and growers.¹⁹ Following intense lobbying by the poultry industry and the Georgia Department of Agriculture, the state's Attorney General issued a preliminary ruling asserting that, as written, the integrator liability provision exceeded the state's authority since ownership of the chickens alone did not equate to operation of the farm.

In response to this ruling, the Georgia Department of Natural Resources revised the proposed rule, eliminating the requirement for all integrators to seek NPDES co-permits. Instead, the revised proposed rule stated that the agency would make case-by-case determinations of whether integrators would be required to join in NPDES co-permits with growers based on an assessment of actual operational control. Even this more modest approach faced stiff opposition. As a result, the Georgia Department of Natural Resources decided to strip the final rule of any language referring to integrator liability/co-permitting.

Lawsuits Involving Use of the CWA

In 2010, environmental groups filed suit seeking to hold a chicken CAFO and the integrator Perdue Farms liable under the CWA for discharging poultry manure from the farm into the nearby Pocomoke River, a tributary of the Chesapeake Bay.²⁰ The judge denied Perdue's motion to dismiss, reasoning that liability under the CWA extends to all entities that exercise sufficient control over the operation causing the violation, including integrators such as Perdue.²¹ While the plaintiffs were still required to prove that Perdue exercised sufficient control to be held liable, they were entitled to discovery on the issue.

The environmental groups ultimately lost, however, because the judge determined that they had failed to establish a discharge from the poultry operation.²² The judge believed that the observed pollution most likely came from the farm's free-roaming cows, not the housed chickens. The lawsuit indicates that judges may be open to extending liability to integrators but that proving

causation—that is, tracing the discharge from its source on the farm to the body of water that it impairs—must be handled with great care.

Disadvantages to Use of the CWA

In theory, co-permitting under the CWA is the most effective way of holding integrators responsible for CAFO wastes. In particular, the NDPES permitting process could be used to hold integrators accountable for ensuring that CAFOs use adequate, well-designed and implemented measures to prevent their wastes from entering nearby water bodies.

In practice, co-permitting faces challenges at both the federal and state level. Any new federal rules would likely prompt uproar in Congress and would almost certainly face a judicial challenge. State efforts would face the same sorts of problem; moreover, integrators could move to unregulated states or at least threaten to do so, a threat that state officials are likely to take very seriously. The only attempt so far by citizen groups to hold integrators liable demonstrates that integrators that exercise substantial control over an AFO may be subject to liability for pollution, but there must be robust evidence of a discharge, which can be difficult to establish.

AFO wastes are an enormous source of water pollution and all responsible parties—especially the largest chicken companies who can most afford it—must share responsibility for cleaning it up. While not without difficulties, the CWA holds the most promise for establishing integrator liability and citizens and the government should continue to push for co-permitting under the Act.

Resource Conservation and Recovery Act

Background

The Resource Conservation and Recovery Act (RCRA) is a federal environmental statute that establishes a comprehensive program to ensure that neither solid nor hazardous wastes harm the environment or public health. RCRA reserves its most stringent requirements for hazardous waste. Nevertheless, a number of provisions apply to the disposal of solid waste. Federal and state regulators as well as citizens may take enforcement action against any person, including owners and operators of facilities, whose handling, storage or disposal of solid waste “may present an imminent and substantial endangerment to health or the environment.”²³ State regulators and citizens may also enforce against any person who violates the statute’s prohibition on “any solid waste management practice . . . which constitutes the open dumping of solid waste.”²⁴ The phrase “solid waste” is a term of art when used in the RCRA context and includes material from agricultural operations to the extent that the material is “garbage, refuse” or other “discarded material.”²⁵

RCRA, nevertheless, explicitly excludes from the definition of solid waste any solid or dissolved material that is subject to regulation as a point source discharge under the CWA,²⁶ and many AFOs are subject to such regulation.²⁷ With regard to unpermitted feeding operations, RCRA’s ban on open dumping does not apply to manures that are “returned to the soil as fertilizers or soil conditioners.”²⁸ Existing case law, however, indicates that RCRA contains no blanket exemption for AFO waste and that RCRA liability can attach to manure that has been overapplied to a field

(that is, applied without regard to the fertilization needs of the crop).²⁹ Since such waste cannot be beneficially used as a crop fertilizer, it is not “returned to the soil as fertilizers” and thus the manure is discarded “transforming it to a solid waste under RCRA.”³⁰

No court has yet found that RCRA liability extends to integrators. Under the statute, a private party may bring suit “against any person . . . including any past or present generator, . . . transporter, or . . . owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”³¹ Congress intended that the term “contribution” be “liberally construed,” and such term includes “a share in any act or effect” giving rise to disposal of the wastes that may present an endangerment.³² In the hazardous waste context, courts have held that “a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process.”³³

Disadvantages to Use of RCRA

Even though RCRA applies in some cases to the overapplication of animal waste, the question remains whether integrators can be held liable under RCRA. Although no court has yet found integrators liable under the statute, such a finding seems to be supported by both the statutory language of the imminent and substantial endangerment provision and by public policy as long as the integrator exercises substantial operational control of the AFO.

Comprehensive Environmental Response, Compensation, and Liability Act

Background

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is a federal environmental law designed to clean up releases of hazardous substances into the environment. CERCLA has a number of provisions that are important in the integrator liability context. Section 103, the emergency notification provision, requires anyone who is in charge of a facility (defined as any site or area where a hazardous substance comes to be located) to report releases of certain defined hazardous substances whenever those releases exceed a specified threshold.³⁴ This provision provides the EPA, state agencies, and the public with needed information about the locations and magnitude of chemical releases.

Section 104 of the Act authorizes the EPA to respond to such releases through removal actions and/or larger scale remediations. The EPA may use funds from the Superfund trust fund to finance these cleanups, or it may use its authority under section 106 to order the responsible party or parties to take action to abate the problem. The EPA may recover the expenses that it incurs during a response action under Section 107 and so may state governments and even private persons. Federal and state trustees may also seek damages for injury to or destruction of natural resources. The persons who are potentially responsible for all of these costs include the current owners and operators of the site where the release occurred, those who owned or operated the site at the time of disposal, those who arranged for disposal, and transporters who

chose the disposal site. Liability under section 107 is joint and several, and no showing of fault is necessary; in other words, strict liability applies.

AFOs are potentially liable under CERCLA in two instances (not including EPA administrative orders compelling a party to respond to a release). First, a person in charge of an AFO that fails to timely report a relevant release under section 103 may be enforced against not only by the EPA but also by states and private citizens. Second, the owners and operators of an AFO are potentially liable under section 107 for the costs of a cleanup performed by the EPA, a state, an Indian tribe, and even private entities as long as the private cleanup meets certain conditions.

The “release” of a “reportable quantity” of a “hazardous substance” other than a federally permitted release, triggers the reporting requirement under section 103. According to CERCLA, a “release” includes “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment,” but excludes “the normal application of fertilizer.”³⁵ A “hazardous substance,” in turn, includes substances designated under particular provisions of the CWA, RCRA, the CAA, the Toxic Substances Control Act, and CERCLA itself.³⁶ Finally, the EPA has by rulemaking promulgated reportable quantities for these substances.³⁷

Several kinds of hazardous substances can be emitted or discharged—released, in other words—at AFOs. Phosphorus, a pollutant found in chicken litter, is one of those hazardous substances and it may find its way into surface water or groundwater if overapplied to the fields. Even though CERCLA excludes the “normal application of fertilizer,”³⁸ the legislative history of CERCLA suggests that this exclusion does not include the overapplication of animal wastes that would not benefit agriculture.³⁹ Moreover, hydrogen sulfide and ammonia, both “hazardous substances” under the Act, can be emitted to the air from animal waste stored in lagoons, pits, or stockpiles or from areas in which animals are stabled or confined.⁴⁰ In 2009, however, the EPA promulgated a final rule providing a full administrative reporting exemption under CERCLA for air releases of hazardous substances from animal waste at farms.⁴¹ A number of groups sued in the D.C. Circuit, and the EPA asked the court to remand the rule to the agency for reconsideration, which the court did in 2010.⁴² The agency has taken no action since then, and the rule remains in effect.

AFOs can also be implicated in a cost recovery action under section 107. In the event that the EPA, a state agency, or another party acted to remove or remediate the release of a hazardous substance (phosphorus, for example), a number of parties may be liable for those costs. These potentially responsible parties include present operators, and integrators could potentially fall into the class of facility operators.

CERCLA defines an “operator” as “[a]ny person . . . operating [the relevant] facility.”⁴³ In *United States v. Bestfoods*,⁴⁴ an action attempting to hold a parent corporation liable for the costs of cleaning up industrial waste generated by a subsidiary’s chemical plant, the U.S. Supreme Court clarified this definition in the following way:

So, under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for

purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous wastes, or decisions about compliance with environmental regulations.⁴⁵

A plaintiff, in such a cost recovery action, might also assert that an integrator is liable as an arranger. CERCLA defines an "arranger" as:

Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by another party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances.⁴⁶

Efforts to Use CERCLA's Emergency Notification Provision

On only two occasions has the EPA taken action against AFOs for failure to report a release under CERCLA. Both involved air emissions, a release for which reporting is no longer required under EPA's 2009 rulemaking. In the first case, the agency intervened in a 1997 citizen suit against Premium Standard Farms for failing to report three million pounds of annual ammonia emissions.⁴⁷ The parties settled, requiring Premium Standard Farms to monitor air emissions of particulate matter, volatile organic compounds, hydrogen sulfide, and ammonia from representative barns and lagoons.⁴⁸ Nine years later, the EPA settled claims against Seaboard Foods under several statutes, including failure to report emissions under CERCLA.⁴⁹ The consent decree required more than 200 Seaboard hog AFOs to report emissions under CERCLA.⁵⁰

In *Sierra Club, Inc. v. Tyson Foods, Inc.*,⁵¹ a federal district court in Kentucky found Tyson Chicken (a subsidiary of Tyson Foods) liable under the CERCLA reporting requirements for ammonia released from confinement operations under contract with Tyson. The court found that Tyson Chicken, a vertical integrator, fit the definition of an "operator" under CERCLA. In reaching this decision, the court relied heavily on the Supreme Court's opinion in *Bestfoods*.⁵² The district court also found that the entire farm constituted a relevant facility for reporting purposes.⁵³ In another Sierra Club citizen suit against Seaboard Farms, the Tenth Circuit held that Seaboard's entire 25,000 head hog operation was one "facility" under CERCLA, and therefore Seaboard was required to report air emissions from the site's manure pits and confinements in the aggregate.⁵⁴ Both of these citizen suits, however, predated the EPA's 2009 rulemaking.

Efforts to Use CERCLA's Liability Provision

In *City of Tulsa v. Tyson Foods, Inc.*,⁵⁵ the city brought claims for cost recovery and contribution under CERCLA.⁵⁶ At the summary judgment stage, the judge found that there was not enough evidence to determine whether the land application of litter was a "release" or whether it fit under the statute's "normal application of fertilizer" exception.⁵⁷ However, the judge did find that the phosphorus contained in poultry litter was a hazardous substance under CERCLA.⁵⁸ The

plaintiffs wanted the court to designate the entire watershed as the facility, arguing that phosphorus could be found throughout the watershed where poultry litter was land-applied by the contract farmers and their neighbors to whom the litter was transferred. The court stated that the definition of “facility” under CERCLA was expansive enough to include the entire watershed but ultimately found the factual record in the case insufficient to determine the boundaries of the facility.⁵⁹

The plaintiffs also alleged that the integrator had “arranged” to transport and store animal wastes in the waterways of the state. To determine whether the integrators were “arrangers” as defined by CERCLA, the court adopted the Eleventh Circuit's approach of “focus[ing] on all of the facts in a particular case.”⁶⁰ It concluded that a party's knowledge of the release, whether a party owns the hazardous substance, and the intent of the parties are relevant but not determinative of whether an integrator is an arranger. Ultimately, the court did not decide whether Tyson was an arranger, opting to make that decision after a full presentation of facts at trial. Before the trial could be concluded, however, the plaintiffs and defendants reached a settlement.⁶¹ The case has no precedential value because the court's prior opinion was vacated following the settlement.

In *City of Waco v. Schouten*,⁶² the City of Waco's claim that dairies were liable under CERCLA for its response costs survived the defendants' motion to dismiss. The city alleged that the defendants improperly stored and maintained large amounts of animal waste on their properties, which caused phosphorus to be released into waterways. The court agreed that this improper handling could constitute a “release” under CERCLA because it involved more than the “normal application of fertilizer.”⁶³ Likewise, the court agreed with the plaintiffs that the phosphorus in the litter constituted a hazardous substance.⁶⁴ Finally, the city alleged that agricultural producers had “arranged” to transport and store animal wastes in the waterways of the state, a claim the court found sufficiently pleaded and thus refused to dismiss.⁶⁵ In early 2006, the dairies reached a settlement with the city.⁶⁶

In *State of Oklahoma v. Tyson Foods, Inc.*,⁶⁷ Oklahoma sought a cost recovery and damages for injury to the state's natural resources stemming from the alleged discharge of phosphorus, arsenic, and other pollutants found in chicken litter to the Illinois River Watershed.⁶⁸ The state claimed that the integrators had either arranged for the disposal of their poultry waste or were owners or operators when the poultry waste was generated, applied to fields, and then discharged to waters of the state.⁶⁹ The trial judge dismissed the state's CERCLA claims, concluding that the state could not proceed because it had failed to include another essential plaintiff—the Cherokee Nation—in its lawsuit against the integrators. As a result, the trial judge did not reach any of the issues noted above, nor did it reach the question of whether integrators could be held liable under CERCLA. The Oklahoma Attorney General appealed the case to the Tenth Circuit, but the appeal was predicated on procedural grounds and did not address the plaintiff's CERCLA claims.⁷⁰

Disadvantages to Use of CERCLA

CERCLA is not the most promising legal tool for establishing integrator liability. Its potential to require integrators to report on the release of hazardous substances from their AFOs is, at best, limited. First, failure-to-report claims under section 103 have focused solely on air pollutants

such as ammonia because only air emissions typically exceed reportable quantities. These air emissions constitute only a small portion of an AFO's waste, thus claims brought under this provision only scratched the surface of the problem. Secondly, any reporting obligation for hazardous air pollutants under CERCLA was effectively eliminated by EPA's 2009 rulemaking that exempted air emissions from animal waste at farming operations from the mandatory reporting requirements of section 103.

One can potentially use CERCLA to hold integrators liable for response costs and damages to natural resources. Such liability, however, depends upon some entity or some person having first acted to either remove or remediate the problem, or upon the decision of a government trustee to seek damages for natural resource damages. There is no mechanism in CERCLA for either a state or a private entity to force a cleanup. Only the EPA can attempt to do that under its authority in section 106. Moreover, one must still prove that a release occurred that triggered the response action, and that depends on whether the application of the chicken litter was consistent with a normal application of fertilizer. And, finally, one still has to prove that the integrator was the operator of the facility or had arranged for disposal.

The Emergency Planning and Community Right-to-Know Act

Background

The Emergency Planning and Community Right-to-Know Act (EPCRA) is a federal environmental law designed to inform the public about potentially harmful releases of hazardous substances and to create a more efficient means to respond to emergencies involving such releases. EPCRA sets up state and local emergency planning committees and requires facilities to report releases of hazardous chemicals.⁷¹

EPCRA excludes from the definition of hazardous chemicals "[a]ny substance to the extent it is used in routine agricultural operations."⁷² This largely restricts the reporting requirements to certain AFO air emissions from the production area of a farm such as ammonia and hydrogen sulfide. The application of manure as fertilizer is exempt.

In December 2008, the EPA promulgated a final rule limiting EPCRA's reporting requirement for animal feeding operations to those that are defined by EPA's CAFO regulations as large CAFOs, based on the number of animals confined.⁷³ Despite court challenges and a remand back to the agency, the 2008 exemption rule remains in effect.

Attempts to Use EPCRA

The EPA successfully enforced the EPCRA reporting requirements in two actions. The first case was resolved by settlement in 2001 with Premium Standard Farms and Continental Grain Company,⁷⁴ while the second, against Seaboard Foods, was settled by agreement in 2006.⁷⁵ In addition, the Sierra Club was successful in one EPCRA citizen suit against an integrator. In *Sierra Club, Inc. v. Tyson Foods, Inc.*,⁷⁶ a federal district court in Kentucky found Tyson Chicken liable under the EPCRA for failing to report the release of ammonia from confinement operations under contract with Tyson.

Disadvantages to the Use of EPCRA

EPCRA offers a somewhat promising tool for holding integrators liable for reporting violations, but it only applies to emissions from production areas and, then, only from large CAFOs.

State Law

State Common Law

Background

Common law refers to the body of judge-made law that evolves over time through judicial decisions. It can be distinguished from positive law—statutes and regulations—which are developed by legislative bodies (*e.g.*, Congress and state legislatures) and regulatory agencies (*e.g.*, the U.S. Environmental Protection Agency or the California Environmental Protection Agency). One branch of common law is “torts.” Tort law seeks to identify and offer remedies for civil wrong (*e.g.*, a person injured in a car accident might use tort law to seek compensation from the person who caused the accident).

The most frequently used common law tort claims brought against AFOs have been based upon “nuisance” and “trespass.” A nuisance involves some action or activity by one person that interferes with a second person’s ability to enjoy his property (*e.g.*, Person 1 makes loud noises constantly impairing Person 2’s enjoyment of his property). A trespass typically refers to a situation where one person or something under his control unlawfully enters onto the property of another (*e.g.*, Person 1 walks across Person 2’s backyard without permission or throws trash into Person 2’s backyard without permission). Neighboring landowners often base their suits against AFOs on nuisance law alleging, for example, that the odors emanating from large accumulations of animal waste have interfered with their quiet enjoyment of the land. They may also sue confinement operations for trespass when either solid or liquid wastes produced by livestock cross onto their properties or enter their groundwater. As AFOs have increased in number and size, the number of lawsuits raising these claims has also increased. As explained below, a few courts have held these feeding operations liable for their wastes under either a nuisance or trespass theory.

While the common law claims of nuisance and trespass provide vehicles for holding AFOs liable for their wastes, a separate common law concept—“vicarious liability”—is needed to attach nuisance or trespass liability to integrators. According to the concept of “vicarious liability,” one who is in some form of a supervisory position (*e.g.*, an employer) can be held liable for a civil wrong committed by a subordinate (*e.g.*, an employee). But, there are limits to how far vicarious liability can reach. For vicarious liability to apply in a given situation, the person in the supervisory position must have some element of control over the actions of the subordinate. Based on this question of control, courts have generally found that while employers can be held liable for the civil wrongs of their employees (committed within the scope of their employment), business entities cannot be held liable for the civil wrongs of independent contractors. The relationship between integrators and operators of AFOs falls somewhere in between the employer-employee relationship and the business-independent contractor relationship. As

explained below, however, some courts have held that, in some instances, an integrator can maintain sufficient control over the actions of its grower to hold it vicariously liable for nuisances created by the AFO or trespasses upon the land of neighboring landowners.

Efforts to Use State Common Law

In *Overgaard v. Rock County Board of Commissioners*,⁷⁷ neighboring landowners brought nuisance and trespass claims against both the owner of a large hog AFO and the integrator. A federal district court in Minnesota found that the integrator's ownership of the hogs, along with significant control over the design and construction of the confinement building, was sufficient to make the integrator liable for nuisance and trespass. Similarly, in *Tyson Foods, Inc. v. Stevens*,⁷⁸ the Alabama Supreme Court found that the integrator had sufficient control over the farmers' activities to warrant the imposition of vicarious liability.

Sometimes, plaintiffs may wish to challenge actions that pose a nuisance to the entire community rather than just their property. These cases involve what is known as a public nuisance, and generally such actions are reserved to state and local authorities. Private parties may bring such cases, however, if they suffer some special injury that is distinct from the general public. In *Neuse River Foundation v. Smithfield Foods, Inc.*,⁷⁹ such a case failed, the court finding that the plaintiffs lacked standing because their alleged injuries were too general in nature.

Disadvantages to Use of Common Law

The use of common law suits against AFOs has been limited by right-to-farm laws, which have been widely adopted. In general, right-to-farm laws are intended to protect farms that engage in "normal" farming activities from "harassing" lawsuits. Right-to-farm laws typically take two approaches: (1) codifying the "coming to the nuisance" defense, whereby activities that were not a nuisance when commenced would not become a nuisance due to the changed land uses of neighbors; and (2) limiting the statutory period in which nuisance suits can be brought, such as requiring nuisance suits to be brought within one year of the establishment of the agricultural operation. The proliferation of AFOs has raised the question as to what constitutes "normal" farming, and states legislatures have responded differently. Some have explicitly extended right-to-farm protections to AFOs,⁸⁰ while others have been more hesitant.

Some state courts, moreover, have been reluctant to broadly apply these kinds of statutes. The Idaho Supreme Court, for example, held that a feedlot would not be protected from nuisance liability when it expanded its operations unless it could show that the surrounding neighborhood had changed such that the residential neighborhood "came to the nuisance." Because the neighborhood had remained substantially unchanged, and the nuisance was caused not by encroaching urbanism but by the defendant's intensified operations, the right-to-farm law was held not to apply.⁸¹ The Washington Supreme Court applied similar reasoning in holding that a right-to-farm law did not apply to a nuisance suit brought by a small farm against a later-established commercial feedlot.⁸²

In 1998, furthermore, the Iowa Supreme Court became the first and only court to invalidate a right-to-farm law as an unconstitutional taking.⁸³ In *Bormann v. Board of Supervisors*, the court

reasoned that the nuisance immunity granted to farmers under an Iowa right-to-farm statute created an easement over adjacent property—consisting of the right to maintain a nuisance—such that it amounted to a taking of that property. The Iowa Supreme Court reaffirmed this holding in *Gacke v. Pork Xtra, LLC*⁸⁴ and invalidated the statutory provisions that prevented property owners subjected to a nuisance from recovering damages for the diminution in value of their property. Other state courts have distinguished *Bormann* and *Gacke* because the Iowa statutes differed from most states’ right-to-farm laws in that they granted agricultural operations a nearly absolute right to create a nuisance, regardless of whether the neighbors “came to the nuisance” or failed to complain within the statutory time period.⁸⁵

Protective State Legislation

Background

Some state legislatures have attempted to deal with the rise of AFOs through statutes aimed at (1) preventing integrators from entering into the kinds of contracts with growers that allow them to largely escape liability for waste; or (2) establishing direct integrator liability.

Limitations on Contract

Nebraska law prohibits a livestock packer from directly or indirectly owning livestock more than five days before slaughter.⁸⁶ Similarly, an Iowa law at one time prohibited certain processors from “directly or indirectly contracting for the care and feeding of swine in th[e] state.”⁸⁷ Because the Iowa statute only applied to out-of-state processors, it was struck down as an unconstitutional burden on interstate commerce.⁸⁸

Efforts to Use State Law to Establish Integrator Liability

In 1998, South Dakota enacted a statute representing the most direct attempt to hold integrators responsible for pollution resulting from AFOs.⁸⁹ The law makes owners of livestock liable, along with those who raise the livestock, for any environmental harms resulting from the arrangement. The statute is limited, however. To make out a claim against an integrator, one must prove negligence on the part of the integrator.

While a bill introduced in the Maryland legislature in 2014 would not have imposed any direct liability upon integrators, it would have required them to at least pay a fee in order to fund environmentally beneficial projects. The “Poultry Fair Share Act” would have placed a 5-cent per head fee on the large poultry companies located on the Eastern Shore, raising about \$15 million a year to pay for cover crops to reduce agricultural runoff related to spreading chicken manure as fertilizer on fields.⁹⁰ The bill did not pass—the Democratic governor threatened to veto it before it even got a hearing—but it was re-introduced in 2015 and may continue to be introduced in coming years.

Disadvantages to Use of State Law

The few states that have managed to successfully address integrators through legislation are clustered in the upper Midwest where confinement livestock production has gained a foothold

only relatively recently. If state legislatures or agencies begin in earnest to enact laws or promulgate regulations to establish integrator liability, poultry companies could threaten to pack up and move to states that have not taken such steps, triggering a race to the bottom.

Conclusion

Fairness demands that the large chicken companies share responsibility for disposing of chicken waste appropriately. As it stands now, multi-billion dollar chicken companies have outsourced this expensive responsibility to small farmers, all the while professing to defend their small growers' interests. This industry is the only one in America today that escapes liability for the improper disposal of its own waste, while, in the process, jeopardizing irreplaceable natural resources like the Chesapeake Bay. As outlined above, federal and state laws provide different tools to hold integrators liable for the waste generated by their contract farmers. Each method has its advantages and drawbacks, and we urge environmental groups to continue with prudent test case litigation that could establish integrator liability.

Establishing this type of liability through litigation, however, is a difficult and challenging proposition for numerous reasons, including politics. In the Maryland integrator-liability case, for example, Perdue poured money into a public relations war against the environmental plaintiffs, using the named family farmer as the sympathetic face of the lawsuit in an effort to obscure its own involvement. No one blinks when a coal plant is sued for violating its permit, but integrators have successfully managed to put family farmers in between themselves, the regulators, and the public to mask the truth about how the industry operates. Litigation will be necessary to move the ball forward, but litigants should proceed with caution.

If state legislatures or agencies begin to enact laws or promulgate regulations to establish integrator liability, poultry companies could threaten to pack up and move to states that have not taken such steps. A federal rule, therefore, is the most efficient and perhaps the fairest way to establish integrator liability. An EPA rule would level the playing field among the states and avoid the evidentiary and political issues that come with litigation. The agency has already made a strong case in its 2003 rule proposal that it has the legal authority to require co-permitting. Such a rule would almost certainly face a legal challenge from the farm lobby, however. Citizen groups must also continue to press for integrator liability through advocacy and litigation, and state governments—where they are able to do so—must lead the way towards a fairer system in which responsibility for AFO waste is shared between the individual farmer and the integrator.

Endnotes

¹ PEW ENVT. GRP., *Big Chicken: Pollution and Industrial Poultry Production in America*, at Introduction (2011), available at <http://www.pewtrusts.org/~media/legacy/uploadedfiles/peg/publications/report/PEGBigChickenJuly2011pdf.pdf>.

² 68 FED. REG. 7176, 7179 (Feb. 12, 2003), available at <http://www.gpo.gov/fdsys/pkg/FR-2003-02-12/pdf/03-3074.pdf>.

³ Chicken litter is a mixture of manure, spilled feed, feathers, and bedding material.

⁴ Michael Wines, N.Y. TIMES, *Behind Toledo's Water Crisis, a Long-Troubled Lake Erie*, Aug. 5, 2014, at A12.

⁵ According to EPA, of the 559,784 miles of impaired rivers and streams, agriculture was responsible for polluting 131,494 miles. U.S. ENVTL. PROTECTION AGENCY, *Watershed Assessment, Tracking & Environmental Results: National Probable Sources Contributing to Impairments*, http://ofmpub.epa.gov/waters10/attains_nation_cy.control#prob_source (last visited Nov. 4, 2014).

⁶ The Clean Air Act (CAA) is not addressed in this Issue Alert. Ammonia, generally the most significant air emission from an AFO, is not listed as a hazardous air pollutant under the Act. In 2011, groups petitioned the EPA to list ammonia gas as a criteria pollutant, the first step towards regulating the gas under the CAA. *Envtl. Integrity Project v. Jackson* (Petition for the Regulation of Ammonia as a Criteria Pollutant Under Clean Air Act Sections 108 and 109), available at <http://environmentalintegrity.org/wp-content/uploads/Petition-by-EIP-2011.pdf>. In January 2014, the groups sued the EPA for failure to act on the petition in contravention of the Administrative Procedure Act. *Envtl. Integrity Project v. EPA*, No. 1:15-cv-00139 (filed Jan. 28, 2015), available at <http://environmentalintegrity.org/wp-content/uploads/EIP-lawsuit-against-EPA.pdf>.

⁷ CAFOs are a subset of AFOs and are defined as large, medium or small facilities. Large CAFOs are defined by the number of animals that are confined at the facility. Medium CAFOs are defined by size and also require a discharge of pollutants. A small CAFO must be designated as such by EPA or a delegated state program. The designation is dependent upon a finding that the AFO is a significant contributor of pollutants to waters of the United States. 40 C.F.R. § 122.23(b). Land application discharges from a CAFO are subject to NPDES permitting requirements unless the manure, litter, or process wastewater has been applied in accordance with a site-specific nutrient management plan, in which case the discharge constitutes an exempt agricultural stormwater discharge. 40 C.F.R. § 122.23(e).

⁸ 33 U.S.C. § 1362(14).

⁹ Exemptions and litigation have whittled away at the number of covered facilities. The EPA started off relatively strong with a 2003 rule that attempted to cover nearly “60 percent of all manure generated by operations that confine animals.” National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7180. A variety of groups sued, with industry organizations led by the National Pork Producers Council and American Farm Bureau Federation on one side. *Waterkeeper Alliance Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). The Second Circuit decided in part in industry’s favor and overturned the portion of the rule that imposed a duty on all CAFOs to either apply for a permit or demonstrate that they have no potential to discharge. When the EPA issued new regulations in 2008, the National Pork Producers Council and the American Farm Bureau Federation sued again, stalling the regulation

and resulting in what is effectively a “catch me if you can” approach to permitting operations. As a result of this litigation and other exemptions, approximately 43 percent of CAFOs nationwide operate under permits. *Examination of the Potential Human Health, Water Quality and Other Impacts of the Confined Animal Feeding Operation Industry: Hearing before the S. Comm. on Env’t & Pub. Works*, 110th Cong 13 (2007), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg73568/pdf/CHRG-110shrg73568.pdf>.

¹⁰ 40 C.F.R. 122.42(e)(1)(vi)–(ix).

¹¹ *Alt v. EPA*, No. 2:12-CV-42, at 5 (N.D.W. Va. Oct. 23, 2013); see also WILLIAM ANDREEN & ANNE HAVEMANN, CTR. FOR PROGRESSIVE REFORM CASE BRIEF #1311, *Alt v. EPA: District Court Ruling Opens Gap in Clean Water Protections, Invites CAFOs to Ignore Pollution Standards* (Dec. 2013), available at http://progressivereform.org/articles/AltvEPA_CaseBrf_1311.pdf (concluding that “In ruling against EPA, Judge Bailey substituted his own interpretation of the statute and implementing regulations instead of deferring to EPA’s reasonable and consistent interpretation.”).

¹² National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3136 (proposed Jan. 12, 2001) (to be codified at 40 C.F.R. pts. 122 & 412).

¹³ *Id.* at 3024.

¹⁴ See *id.* (citing various cases and concluding that “under the existing regulation and existing case law, integrators which are responsible for or control the performance of the work at individual CAFOs may be subject to the CWA as an operator of the CAFO.”).

¹⁵ RENA STEINZOR, JAMES GOODWIN, MATTHEW SHUDTZ, & ANNE HAVEMANN, CTR. FOR PROGRESSIVE REFORM, *Barack Obama’s Path to Progress in 2015–16: 13 Essential Regulatory Actions* (Nov. 2014), <http://www.progressivereform.org/13RulesCAFOs.cfm>.

¹⁶ Paul L. Sorisio, *Poultry, Waste, and Pollution: the Lack of Enforcement of Maryland’s Water Quality Improvement Act*, 62 MD. L. REV. 1054, 1065–67 (2003).

¹⁷ *In re Tyson Foods, Inc.*, Case Nos. MDE-WMA-63-200200001 to 03, Md. Office of Admin. Hearings, 8 (Aug. 23, 2002).

¹⁸ Susan M. Brehm, *Comment, From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production*, 93 CALIF. L. REV. 797, 830 (2005) (citing Kentucky Administrative Regulation Review Subcommittee, Meeting of Aug. 1, 2000, available at <http://162.114.4.13/statcomm/adminreg/000801.htm>).

¹⁹ See *id.* at 1061–63 (outlining the history of Georgia’s co-permitting efforts).

²⁰ *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433 (D. Md. 2010).

²¹ *Id.* at 442 (“The statute clearly makes violations by ‘any person’ unlawful, not solely permit-holders.”).

²² *Waterkeeper Alliance, Inc. v. Alan Hudson*, No. WMN–10–487, 2012 WL 6651930 (D. Md. Dec. 20, 2012).

²³ 42 U.S.C. § 6972(a)(1)(B) (citizen suit provision); 42 U.S.C. § 6973(a) (granting the EPA enforcement authority over imminent dangers).

²⁴ 42 U.S.C. § 6945(a) (2012).

²⁵ 42 U.S.C. § 6903(27).

²⁶ 42 U.S.C. § 6903(27) (2012) (known as the nonduplication provision); *Coon v. Willet Dairy*, No. 07-3454-cv (2d Cir. 2008) (holding that RCRA does not apply to any activity that is subject to a CWA NPDES permit).

²⁷ Although, as noted in note 6, *supra*, the farm lobby has successfully decreased the number of AFOs that are required to obtain NPDES permits.

²⁸ 40 C.F.R. § 257.1(c)(1) (2014).

²⁹ Community Assoc. for Restoration of the Env't., Inc. v. Cow Palace, LLC, No. 13-CV-3016-TOR, at 85 (E.D. Wash. filed Jan. 14, 2015) (order re: cross motions for summary judgment), available at http://www.centerforfoodsafety.org.php53-2.ord1-1.websitetestlink.com/files/320--order-granting-in-part-msj-11415_78926.pdf; Waterkeeper Alliance, Inc. v. Smithfield Foods, Inc., 2001 WL 1715730, at 4-5 (E.D.N.C. Sept. 20, 2001).

³⁰ *Cow Palace, LLC*, No. 13-CV-3016-TOR, at 88.

³¹ 42 U.S.C. § 6972(a)(1)(B).

³² *Cow Palace, LLC*, No. 13-CV-2013-TOR, at 105 (citing *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383–84 (2d Cir. 1989)).

³³ *Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 852 (9th Cir. 2011).

³⁴ 42 U.S.C. § 9603(a).

³⁵ 42 U.S.C. § 9601(22).

³⁶ 42 U.S.C. § 9601(14).

³⁷ 40 C.F.R. Part 302 (2014).

³⁸ 42 U.S.C. § 9601(22)(D).

³⁹ See *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1287 n.15 (N.D. Okla. 2003) (vacated pursuant to settlement) (quoting S. Rep. No. 96–848, at 46 (1980)), which states:

The term “normal field application” means the act of putting fertilizer on crops or cropland, and does not mean any dumping, spilling, or emitting, whether accidental or intentional, in any other place or of significantly greater concentrations or amounts than are beneficial to crops.

The settlement of the lawsuit included a moratorium on the application of poultry litter in the watershed. 2003 U.S. Dist. LEXIS 23416, at *3 (N.D. Okla. July 16, 2003).

⁴⁰ 73 Fed. Reg. 76,948, 76950 (Dec. 18, 2008).

⁴¹ *Id.*

⁴² See MEGAN STUBBS, CONG. RESEARCH SERV., R 41622, ENVIRONMENTAL REGULATION AND AGRICULTURE 17 (2013).

⁴³ 42 U.S.C. § 9601(20).

⁴⁴ 524 U.S. 51 (1998).

⁴⁵ *Bestfoods*, 524 U.S. at 66.

⁴⁶ 42 U.S.C. § 9607(a)(3).

⁴⁷ *Citizens Legal Env'tl. Action Network v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 WL 220464 (W.D. Mo. 2000).

⁴⁸ Consent Decree, *Citizens Legal Env'tl. Action Network, Inc. v. Premium Standard Farms, Inc.*, Case Nos. 97-6073-CV-SJ-6 and 98-6099-CV-W-6, at Appendix F (W.D. Mo. 2001), available at <http://www2.epa.gov/sites/production/files/documents/psfcd.pdf>.

⁴⁹ Consent Decree, *United States v. Seaboard Foods L.P.*, Civil Action No. 06-CV-00989-R (10th Cir. 2006), *aff'd* 387 F.3d 1167, available at <http://www2.epa.gov/sites/production/files/2013-09/documents/seaboard-cd-060915.pdf>.

⁵⁰ *Id.* at App.B.

⁵¹ 299 F. Supp. 2d 693, 706 (W.D. Ky. 2003).

⁵² *Id.* at 717–18 (citing *Bestfoods*, 524 U.S. 51, 66–67 (1998)).

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- ⁵³ *Id.* at 708.
- ⁵⁴ *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1176 (2004). For an excellent argument for using CERCLA and EPCRA to regulate CAFO emissions, see Tarah Heinzen, *Essay: Stopping the Campaign to Deregulate Factory Farm Air Pollution*, 17 N.Y.U. ENVTL. L.J. 1482 (2009).
- ⁵⁵ 258 F. Supp. 2d 1263 (N.D. Okla. 2003) (opinion vacated).
- ⁵⁶ 42 U.S.C. §§ 9607(a) and 9613(f).
- ⁵⁷ *City of Tulsa*, 258 F. Supp. 2d at 1288.
- ⁵⁸ *Id.* at 1283.
- ⁵⁹ *Id.* at 1280.
- ⁶⁰ *S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 407-08 (11th Cir. 1996).
- ⁶¹ *City of Tulsa v. Tyson Foods, Inc.*, No. 01 CV 0900EA(C), 2003 U.S. Dist. LEXIS 23416 (N.D. Okla. July 16, 2003).
- ⁶² 385 F. Supp. 2d 595 (W.D. Tex. 2005).
- ⁶³ *Id.* at 602.
- ⁶⁴ *Id.*
- ⁶⁵ *Id.*
- ⁶⁶ Doug Myers, STEPHENVILLE EMPIRE TRIB., *City of Waco Settles Lawsuit with Dairies*, Jan. 20, 2006.
- ⁶⁷ No. 05–CV–329–GKF–PJC, 258 F.R.D. 472 (N.D. Okla. July 22, 2009).
- ⁶⁸ First Amended Complaint, at 19, *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, No. 4:05-CV-329-JOE-SAJ, (N.D. Okla. Aug. 19, 2005), *available at* https://ecf.oknd.uscourts.gov/cgi-bin/DisplayPDF.pl?dm_id=368158&dm_seq=1.
- ⁶⁹ *Id.* at 22.
- ⁷⁰ *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223 (10th Cir. 2010).
- ⁷¹ 42 U.S.C. § 11004.
- ⁷² 42 U.S.C. § 11021(e)(5).
- ⁷³ 73 Fed. Reg. 76,948 (Dec. 18, 2008).
- ⁷⁴ Consent Decree, *Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc.*, Case Nos. 97-6073-CV-SJ-6 and 98-6099-CV-W-6, at Appendix F (W.D. Mo. 2001), *available at* <http://www2.epa.gov/sites/production/files/documents/psfcd.pdf>.
- ⁷⁵ Consent Decree, *United States v. Seaboard Foods L.P.*, Civil Action No. 06-CV-00989-R (10th Cir. 2006), *aff'd* 387 F.3d 1167, *available at* <http://www2.epa.gov/sites/production/files/2013-09/documents/seaboard-cd-060915.pdf>.
- ⁷⁶ 299 F. Supp. 2d 693, 706 (W.D. Ky. 2003).
- ⁷⁷ 2002 WL 31924522 (D. Minn. Dec. 30, 2002).
- ⁷⁸ 783 So. 2d 804 (Ala. 2000).
- ⁷⁹ 574 S.E. 2d 48, 53-54 (N.C. Ct. App. 2002).
- ⁸⁰ *See, e.g.*, IOWA CODE § 172D.2; KAN. STAT. ANN. § 47-1505; NEB. REV. STAT. 81-1506(1)(b); TENN. CODE ANN. §§ 44-18-101 to 44-18-104 (applicable to dairy farms and poultry houses in addition to feedlots); WYO. STAT. §§ 11-39-101 to 11-39-104.
- ⁸¹ *Payne v. Skaar*, 127 Idaho 341, 900 P.2d 1352 (1995).
- ⁸² *Buchanan v. Simplot Feeders, Ltd. Partnership*, 134 Wash. 2d 673, 952 P.2d 610 (1998).
- ⁸³ *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998).
- ⁸⁴ 684 N.W.2d 168 (Iowa 2004).

⁸⁵ See, e.g., *Overgaard v. Rock County Bd. of Com'rs*, No. Civ.A.02-601, 2003 WL 21744235, at *7 (D. Minn. July 25, 2003) (holding that the *Bormann* reasoning was “not applicable to the Minnesota Right to Farm Act” because the act allows neighbors to bring a nuisance suit within two years from the established date of the farming operation).

⁸⁶ NEB. REV. STAT. ANN. § 54-2604.

⁸⁷ See *Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978, 986 (S.D. Iowa 2003) (citing Iowa Code § 9H.2 (as amended in 2000 and 2002)).

⁸⁸ *Smithfield Foods*, 241 F. Supp. 2d at 990.

⁸⁹ S.D. Codified Laws § 20-9-30. The statute states:

Any person who holds an ownership interest in livestock and negligently entrusts the possession or control of that livestock to another person shall be jointly and severally liable for all environmental damages which are caused by the acts or omissions of the person entrusted with those livestock and which arise from the possession or control of that livestock.

⁹⁰ HB 0905; SB 0725 (2014); HB 0886; SB 0533 (2015).

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Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information.

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